

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF GEORGIA  
MACON DIVISION**

|                          |   |                      |
|--------------------------|---|----------------------|
| ROGER C. DAY, JR.,       | : |                      |
|                          | : |                      |
| Petitioner               | : |                      |
|                          | : |                      |
| VS.                      | : |                      |
|                          | : |                      |
| Warden L. STEVEN BENTON, | : | NO. 5:05-CV-54 (CAR) |
|                          | : |                      |
| Respondent               | : | <b><u>ORDER</u></b>  |

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Before the Court is petitioner **ROGER C. DAY'S** motion for a certificate of appealability ("COA") (Tab # 35) from the Court's November 18, 2008 (Tab # 33) order dismissing as untimely petitioner's Fed.R.Civ.P. 60(b) motion. Petitioner's Rule 60(b) motion sought relief from Magistrate Judge Hicks' May 24, 2005 recommendation and the undersigned's June 24, 2005 order dismissing petitioner's habeas petition.

The Eleventh Circuit Court of Appeals has held that a petitioner is required to obtain a COA to appeal the denial of a Rule 60(b) motion. *Gonzalez v. Secretary of Dep't of Corrections*, 317 F.3d 1308, 1312 (11<sup>th</sup> Cir. 2004). Under 28 U.S.C. § 2253(c), a COA may issue only if the applicant has made a substantial showing of the denial of a constitutional right. For the reasons stated in this Court's November 18, 2008 order, the undersigned finds that petitioner has not made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). Accordingly, the application for a COA is **DENIED**.

Also before the Court is petitioner's motion for leave to proceed *in forma pauperis* on appeal. Said motion is **DENIED AS MOOT**.

**SO ORDERED**, this 20th day of January, 2009.

S/ C. Ashley Royal  
C. ASHLEY ROYAL  
UNITED STATES DISTRICT JUDGE

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